UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 63

Docket No. PH-0752-10-0118-I-1

Debra A. Lopes,

Appellant,

v.

Department of the Navy,

Agency.

June 17, 2011

Evan S. Greenstein, Esquire, Washington, D.C., and Frank L. Womack, North Providence, Rhode Island, for the appellant.

Colleen Ewing, Groton, Connecticut, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision affirming her removal for misuse of her government telephone, laptop computer, and desktop computer. We REVERSE the initial decision and ORDER the agency to CANCEL the appellant's removal for the reasons set forth below.

BACKGROUND

¶2 The appellant worked as an Information Technology Specialist, GS-11, for the agency. Initial Appeal File (IAF), Tab 4, Subtab K. On October 1, 2009, the

agency proposed to remove the appellant based on the charges of misuse of her government telephone, misuse of her government laptop computer, and misuse of her government desktop computer. *Id.*, Subtab I at 1. The charges included twelve specifications alleging, inter alia, that the appellant spent 18.7 hours talking about non-government business on her government telephone over a 14-week period, that she accessed hundreds of web sites from her government desktop computer and laptop computer that were not related to her assigned duties between March 2009 and July 2009, that she utilized her administrative privileges to access numerous documents not related to her assigned duties on her government desktop computer, and that she sent and received at least 16 e-mails on her government desktop computer between March 2008 and July 2009 that were not related to her assigned duties. *Id.* at 1-3. On November 5, 2009, following consideration of the appellant's oral and written replies, the deciding official sustained the appellant's removal, effective November 20, 2009, and the appellant filed a timely appeal with the Board. *Id.*, Subtabs C, E; IAF, Tab 1.

¶3 After holding the hearing requested by the appellant, the administrative judge affirmed the appellant's removal, sustaining eight of the twelve specifications.[1] IAF, Tab 15, Initial Decision at 19. The administrative judge found that the agency established a nexus between the sustained misconduct and the efficiency of the service and that the penalty of removal was reasonable. *Id.* at 16, 18. He noted that the deciding official, who was also the appellant's second-line supervisor, set out the factors that he considered in determining the

[1] We note that the administrative judge apparently interpreted the agency's notice of proposed removal as consisting of one charge with twelve accompanying specifications, rather than three separate charges as set forth by the proposal notice. *See, e.g.*, Initial Decision at 2, 16. Based on the specifications sustained by the administrative judge, the agency's charges of misuse of a government telephone and misuse of a government desktop computer were sustained and the charge of misuse of a government laptop computer was not sustained as the administrative judge did not sustain specification 2, the only specification involving the appellant's laptop computer. *Id.* at 7, 13, 15.

appropriate penalty in the decision letter and in his testimony, including the appellant's reply to the proposed removal and the relevant *Douglas* factors. *Id.* at 17-18. The administrative judge found that the deciding official appropriately considered the appellant's prior 3-day suspension in February 2000 for misuse of a government credit card. *Id.* at 17-18 & n.*. The administrative judge also found that the deciding official appropriately considered the relevant *Douglas* factors, that the sustained misconduct was serious, and that the penalty of removal was within the tolerable bounds of reasonableness. *Id.* at 18.

¶4 The appellant has filed a timely petition for review. Petition for Review (PFR) File, Tab 3. The agency has filed a response in opposition. *Id.*, Tab 4.

ANALYSIS

¶5 When an agency intends to rely on aggravating factors, such as prior discipline, as the basis for the imposition of a penalty, such factors should be included in the advance notice of adverse action so that the employee will have a fair opportunity to respond to those factors before the agency's deciding official. *Vena v. Department of Labor*, 111 M.S.P.R. 165, ¶ 9 (2009); *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 304 (1981). Similarly, it is improper for a deciding official to rely on an employee's alleged negative past work record in determining the penalty when the employee was not disciplined for the purported misconduct and where the incidents are mentioned as an aggravating factor for the first time in a Board proceeding. *Westmoreland v. Department of Veterans Affairs*, 83 M.S.P.R. 625, ¶¶ 7-9 (1999) (citing *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1376 (Fed. Cir. 1999)), *aff'd*, 19 F. App'x 868 (Fed. Cir. 2001).

¶6 Our reviewing court has recently held that, if an employee has not been given "notice of any aggravating factors supporting an enhanced penalty[,]" an *ex parte* communication with the deciding official regarding such factors may constitute a constitutional due process violation. *Ward v. U.S. Postal Service*,

634 F.3d 1274, 1280 (Fed. Cir. 2011). When such circumstances are present, the court directed the Board to analyze whether the additional aggravating factors supporting an enhanced penalty constituted new and material information under the factors set forth in *Stone*. *See Ward*, 634 F.3d at 1280. The court in *Ward* made clear that, if a constitutional violation has occurred, it cannot be considered a harmless error and the agency action must be reversed. *Id*.

¶7 In *Stone*, the court held that, when determining whether to apply the harmless error rule for procedural errors, or to find a due process violation with respect to such activity, the Board should "consider the facts and circumstances of each particular case." *Stone*, 179 F.3d at 1377.

> Only *ex parte* communications that introduce new and material information to the deciding official will violate the due process guarantee of notice. In deciding whether new and material information has been introduced by means of *ex parte* contacts, the Board should . . . [consider]: whether the *ex parte* communication merely introduces "cumulative" information or new information; whether the employee knew of the error and had a chance to respond to it; and whether the *ex parte* communications were of the type likely to result in undue pressure upon the deciding official to rule in a particular manner. Ultimately, the inquiry of the Board is whether the *ex parte* communication is so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances.

Id.; *see Ward*, 634 F.3d at 1280 (instructing the Board to apply *Stone* to any aggravating information to determine if "new and material information" was introduced); *Blank v. Department of the Army*, 247 F.3d 1225, 1229 (Fed. Cir. 2001) (applying the *Stone* criteria). The court also stated in *Stone* that "[w]hen deciding officials receive such *ex parte* communications, employees are no longer on notice of the reasons for their dismissal and/or the evidence relied upon by the agency," and that "[p]rocedural due process guarantees are not met if the employee has notice only of certain charges or portions of the evidence and the

deciding official considers new and material information." *Stone*, 179 F.3d at 1376.

¶*8* In her petition for review, the appellant does not assert that the deciding official should not have considered her alleged past instances of misconduct or her prior discipline on the basis that the agency failed to mention either in the notice of proposed removal or the decision letter.[2] We find, however, that the administrative judge erred in failing to address the deciding official's improper consideration of the appellant's prior discipline and alleged past instances of misconduct in imposing the penalty of removal given that these factors were not included in the notice of proposed removal. *See* Initial Decision at 17-18.

¶9 The record reveals that, in his written evaluation of the *Douglas* factors, the deciding official listed the appellant's prior 3-day suspension in February 2000 for misuse of a government credit card. IAF, Tab 4, Subtab D at 3. Additionally, the deciding official testified that he considered the appellant's 3-day suspension when evaluating the *Douglas* factors, noting that "[t]here's a level of trust associated with a government credit card as there is an Admin account, so that was a consideration . . . ." Hearing Transcript (HT) at 81. The deciding official also testified that the appellant's work record was "checkered in the sense that there were a number of instances of the [appellant] creating tension within the work area, some confrontational behavior, and misuse of the credit card previously noted." HT at 82. Similarly, in his written evaluation of the *Douglas* factors, the deciding official stated that, with respect to the appellant's past work record, he was "aware of episodes of erratic timeliness to work and patterns of

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[2] In her petition for review, the appellant asserts that the deciding official improperly considered her 3-day suspension for misuse of a government credit card in 2000 because it occurred nearly 10 years ago. PFR File, Tab 3 at 13. Because it was improper to consider the 3-day suspension without providing notice of its consideration to the appellant, we have not addressed whether it was appropriate to consider the 3-day suspension based on its age.

leave abuse" as well as "instances of confrontational behavior" and admonishment "for soliciting money from junior employees while at work to repay personal indebtedness." IAF, Tab 4, Subtab D at 3. The agency did not include the appellant's prior 3-day suspension or her alleged past instances of misconduct as factors on which it relied in proposing her removal or in its decision letter.[3] *See id.*, Subtab I at 1-5; *id.*, Subtab C.

¶10 We first note that the instant case does not involve the same type of *ex parte* communications at issue in *Stone* and *Ward* because there is no evidence that the deciding official learned of the appellant's prior 3-day suspension or alleged past instances of misconduct from the proposing official, another agency employee, or any outside source. *See Ward*, 634 F.3d at 1278 (considering the deciding official's *ex parte* communications with three supervisors and one manager from the agency during which he learned of several alleged past instances of misconduct by Mr. Ward); *Stone*, 179 F.3d at 1372-73 (considering *ex parte* memoranda received by the deciding official from the proposing official and another agency official urging Mr. Stone's removal). Rather, the record here indicates that the deciding official, most likely as a result of his role as the appellant's second-level supervisor, was personally aware of the appellant's 3-day suspension as well as the alleged past instances of misconduct. *See* HT at 81-82, 96-97. Nevertheless, we discern, and the Federal Circuit has suggested, no basis on which to distinguish *ex parte* communications introducing new and material information not included in the notice of proposed removal that was previously unknown by the deciding official from material information related to

[3] While the deciding official later testified on cross-examination that he used only "the case file . . . in front of [him]," the lengthy "case file," consisting of the notice of proposed removal and accompanying evidence relied upon by the agency, does not reference the appellant's prior 3-day suspension or other alleged past misconduct noted by the deciding official in his testimony and his written evaluation of the *Douglas* factors. *See* HT at 97; IAF, Tab 4, Subtab I.

an employee's past disciplinary record and alleged past instances of misconduct personally known and considered by the deciding official. When a deciding official considers either type of information, the employee is no longer on notice of portions of the evidence relied upon by the agency in imposing the penalty, resulting in a potential constitutional violation. *See Stone*, 179 F.3d at 1376; *Powers v. Department of the Treasury*, 86 M.S.P.R. 256, ¶ 9 (2000).

¶11 Applying the factors set forth in *Stone*, the information related to the appellant's prior 3-day suspension and other alleged past instances of misconduct considered by the deciding official in his penalty analysis constitutes new, rather than cumulative, information. While the appellant was clearly aware of her prior 3-day suspension and potentially even aware of the other alleged misconduct cited by the deciding official, the agency did not include this information in its notice of proposed removal or elsewhere in the case file provided to the appellant, and thus it cannot be considered cumulative. *See* IAF, Tab 4, Subtab I. Further, because the agency failed to advise the appellant that it considered such information in proposing or deciding to remove her, the appellant did not have an opportunity to respond to it.

¶12 Moreover, while it is undisputed based on his testimony and written evaluation of the *Douglas* factors that the deciding official considered the prior 3-day suspension and alleged past instances of misconduct, there is no evidence that the information resulted in undue pressure on the deciding official to remove the appellant. Addressing this factor, however, the Federal Circuit in *Ward* emphasized that whether the additional information was of the type likely to result in undue pressure upon the deciding official is only one of the several enumerated factors and is not the ultimate inquiry in the *Stone* analysis. *Ward*, 634 F.3d at 1280 n.2. The court recognized that "the lack of such undue pressure may be less relevant to determining when the ex parte communications deprived the employee of due process where . . . the [d]eciding [o]fficial admits that the ex parte communications influenced his penalty determination," making the

"materiality of the ex parte communications . . . self-evident from the [d]eciding [o]fficial's admission." *Id.* Therefore, while no clear evidence of undue pressure exists in the record, the deciding official's consistent statements in his testimony and written statement on the *Douglas* factors are clear evidence of the materiality of the appellant's past disciplinary record and alleged past instances of misconduct in the deciding official's decision to remove the appellant.

¶13 We find that the information regarding the appellant's 3-day suspension and other alleged past instances of misconduct constitutes new and material information in light of the fact that the agency failed to advise the appellant that it would consider such information in determining the appropriate penalty. *See Stone*, 179 F.3d at 1377; *see also Ward*, 634 F.3d at 1280. We further find that the deciding official's consideration of such aggravating factors without the appellant's knowledge was "so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances." *See Stone*, 179 F.3d at 1377. Consequently, because the agency violated the appellant's due process guarantee to notice, the agency's error cannot be excused as harmless, and the appellant's removal must be cancelled. *See Ward*, 634 F.3d at 1280. The agency may not remove the appellant unless and until she is afforded a new "constitutionally correct removal procedure." *See Stone*, 179 F.3d at 1377; *see also Ward*, 634 F.3d at 1280.

¶14 Accordingly, we REVERSE the initial decision and DO NOT sustain the removal action.[4]

ORDER

¶15 We ORDER the agency to cancel the appellant's removal and to restore the appellant effective November 20, 2009. *See Kerr v. National Endowment for the*

[4] In reversing the appellant's removal, we make no findings with respect to the merits of the agency's charges.

Arts, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶16 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶17 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶18 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶19 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the

Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶20 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does

not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.